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OFFICE OF PETITIONS

ON PETITION

In re Application of :
Lothar E.S. Budike Jr. :
Application No. 09/299,124 :
Filed: April 26, 1999 :
Attorney Docket No. PWB-119C :

This is a decision on the petition under 37 CFR 1.137(b), filed June 6, 2002, to revive the above-identified application.

The petition is **DISMISSED**.

Any request for reconsideration of this decision must be submitted within TWO (2) MONTHS from the mail date of this decision. Extensions of time under 37 CFR 1.136(a) are permitted. The reconsideration request should include a cover letter entitled "Renewed Petition under 37 CFR 1.137(b)." This is not a final agency action within the meaning of 5 U.S.C. § 704.

The above-identified application became abandoned for failure to reply in a timely manner to the non-final Office action remailed on October 2, 2001, which set a shortened statutory period for reply of three (3) months. No extensions of time under the provisions of 37 CFR 1.136(a) were obtained. Accordingly, the above-identified application became abandoned on January 3, 2002.

A grantable petition under 37 CFR 1.137(b) must be accompanied by: (1) the required reply, unless previously filed; (2) the petition fee as set forth in 37 CFR 1.17(m); (3) a statement that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to 37 CFR 1.137(b) was unintentional; and (4) any terminal disclaimer (and fee as set forth in 37 CFR 1.20(d)) required by 37 CFR 1.137(c). Where there is a question as to whether either the abandonment or the delay in filing a petition under 37 CFR 1.137 was unintentional, the Commissioner may require additional information. See MPEP 711.03(c)(III)(C) and (D). The instant petition lacks item (3).

*Not a grantable
discovery
1305
dr*

Applicant, Lothar E.S. Budike, states:

I did not direct my attorney to file a Response in this application in a timely fashion because the application has been assigned to Powerweb, Inc. I was President of the company and handling payments on all patent matters. Prior to the due date of the Response, I was removed from some financial and management responsibilities and directed the new people in charge to send payment to my attorney and have him file a timely Response with a Terminal Disclaimer and proper fee. When they looked at their records they confused two different patent applications and failed to contact the attorney, because the other application had already been taken care of.

37 CFR 1.137(b) provides that "[t]he Commissioner may require additional information where there is a question whether the delay was unintentional." Where there is a question whether the delay was unintentional, the petition must meet the burden of establishing that the delay was unintentional within the meaning of 35 U.S.C. § 41(a)(7) and 37 CFR 1.137(b). See In re Application of G, 11 USPQ2d 1378, 1380 (Comm'r Pats. 1989). The language of both 35 U.S.C. § 41(a)(7) and 37 CFR 1.137(b) are clear and unambiguous, and, furthermore, without qualification. That is, the delay in filing the reply during prosecution, as well as in filing the petition seeking revival, must have been, without qualification "unintentional" for the reply to now be accepted on petition. The current showing of record raises a question as to whether the delay in filing the reply within the time period set in the Office action on October 2, 2001 was in fact unintentional as to the party having interest in the instant application.

The showing of record is that applicant, Mr. Budike, was removed from some of his financial and management responsibilities in view of the assignment of the application to Powerweb, Inc. Therefore, it is unclear whether Mr. Budike was the party in interest having apparent authority to direct the prosecution of the instant application. When the issue of revival is addressed, the focus must be on the rights of the parties as of the time of abandonment. See Kim v. Quigg, 781 F.Supp. 1280, 1284, 12 USPQ2d 1604, 1607 (E.D. Va 1989). It is noted that applicant Budike assigned his interests in this application to Powerweb, Inc. on April 12, 1999. Therefore, applicant, as the assignor of his interest, could not demand that the assignee prosecute this case. As noted in MPEP 711.03(c), the question under 37 CFR 1.137 is whether the delay on the part of the party having the right or authority to reply to avoid abandonment (or not to reply) was unintentional). From the statements presented, it is unclear as to who was the proper party in

interest in the instant matter and as to who was responsible for making decisions as to the prosecution of the instant application. In view of the above, further clarification is required as to the party having apparent authority to direct the prosecution of the instant application. Further, an explanation as to the unintentional delay in replying to the outstanding Office action of October 2, 2001 should be provided from the parties responsible for the delay.

In order to expedite revival of this application, petitioner may wish to consider submitting the items required by this decision on petition in a renewed petition under 37 CFR 1.137(b) by facsimile transmission to the telephone number indicated below and to the attention of the undersigned.

Further correspondence with respect to this matter should be addressed as follows:

By mail: Assistant Commissioner for Patents
Box DAC
Washington, D.C. 20231

By facsimile: (703) 308-6916
Attn: Office of Petitions

By hand: Office of Petitions
2201 South Clark Place
Crystal Plaza 4, Suite 3C23
Arlington, VA 22202

Telephone inquiries concerning this decision should be directed to the undersigned at (703) 305-8680.



Frances Hicks
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for Patent Examination Policy